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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91211530
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

Registration No. 3682041
For the mark ADVENTURES OF SHADOW,

J-Lynn Entertainment, LLC,

Petitioner,

vs.

William T. Odonnell,

Registrant.

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Opposition No. 91211530
(Parent)

Cancellation No. 92056491
(Child)

MOTION FOR RECONSIDERATION OF FINAL DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
MOTION FOR RECONSIDERATION OF FINAL DECISION.....	4
ARGUMENTS.....	5
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17
ATTACHMENT EXHIBIT.....	18

TABLE OF AUTHORITIES

Page(s)

Cases

Republic Tobacco, L.P. v. Mark R. Newman, Cancellation No. 92049348

Republic Tobacco, L.P. v. Mark R. Newman (TTAB 2013)9, 11, 12

Rivard v. Linville, Cancellation No. 19874

Rivard v. Linville, 45 USPQ2d at 13768, 10

Imperial Tobacco Ltd. v. Philip Morris Inc, Cancellation No. 92016024

Imperial Tobacco Ltd. v. Philip Morris Inc., 14 USPQ2d at 1394.....8, 9, 10, 11

Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons Inc, Cancellation No. 92022137

Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons Inc., 55 USPQ2d 1298, 1303(TTAB 2000).....8, 10

Parfums Nautee Ltd. v. American International Industries, Cancellation No. 92018174

Parfums Nautee Ltd. v. American International Industries, 22 USPQ2d 1306, 1309 (TTAB 1992).....9, 11

Cerveceria India Inc. v. Cerveceria Centroamericana, S.A., Cancellation No. 92014654

Cerveceria India Inc. v. Cerveceria Centroamericana, S.A., 10 USPQ2d 1064 (TTAB 1989).....10

In re Mother Tucker’s Food Experience (Canada) Inc., 925 F.2d 1402, 17 USPQ2d 1795 (Fed. Cir. 1991)

In re Mother Tucker’s Food Experience (Canada) Inc.....9, 12

In re Silenus Wines, Inc., 557 F.2d 806, 194 USPQ 261 (CCPA1977)

In re Silenus Wines, Inc., 557 F.2d 806, 194 USPQ 261 (CCPA1977)9, 12

Larry Harmon Pictures Corp. v. The Williams Restaurant Corp, Cancellation N0. 91073217

Larry Harmon Pictures Corp. v. The Williams Restaurant Corp., 929 F.2d 662, 18 USPQ2d 1292 (Fed. Cir. 1991).
.....9, 11, 12

ShutEmDown Sports, 102 USPQ2d at 1045

ShutEmDown Sports, 102 USPQ2d at 1045.....14

MOTION FOR RECONSIDERATION OF FINAL DECISION

Pursuant to 37 C.F.R. § 2.129(c) and TBMP § 543 (2016), J-Lynn Entertainment LLC ("Opposer") respectfully submits its motion for reconsideration of the Board's final decision. The Opposer would like to thank the Board for carefully reviewing the case and agrees with the decision to refuse the Application Serial No. 85785996, and the cancellation of classes 9 and 16 for Registration No. 3682041.

The Opposer respectfully disagrees with the Boards' decision to deny cancellation of Registration No. 3682041 for Class 32 on the basis that the Board erred on reaching its decision for Class 32. The Opposer believes that Registration No. 3682041 is subject to cancellation on the basis for non-use, purposeful abandonment, and fraud. The Opposer presents the following arguments, previous Board decisions, and highlighting of evidence it believes the Board has overlooked or misinterpreted, and pointing out evidence that suggests the Applicant William T Odonnell committed perjury about the sale of water bottles during his deposition constituting the Opposer's claim of fraud. The Opposer will also point out wording the Applicant used in the series of emails to a water supplier that would support the fact that the Application No. 77461457 for Class 32 was void *ab initio* and that the indication that Odonnell had sold 350 and 600 water bottles which the Board found sufficient to support the Respondent's use was erred because those 350 and 600 water bottles did not use the Applicant's mark and the specimen submitted for that application was a digital mockup like the Applicant's digital mockup of a t-shirt which the Board stated on pg. 11 of its decision a digital mockup with any corresponding sales of goods does not support use in commerce as contemplated by Section 45.

ARGUMENTS

In Section A, the Opposer makes the arguments for the Boards erred opinion on pg 15¹ of its decision regarding class 32, and addresses the Applicant's set of achronological emails and picture of a water bottle introduced in the Odonnell deposition and the lack of evidence that labels were actually ordered and manufactured. Section B, the Opposer addresses arguments for Abandonment and the Applicant's act of perjury during his deposition. Section C, highlights the Applicants behavior and inability to provide evidence or purposely withhold requested evidence by the Opposer.

A. Argument Against The Board's Erred Finding That Evidence Was Sufficient To Support Respondent's Use Of The Mark On Bottled Water At Least As Early As The Filing Date Of The Application.

1. Applicant's emails to a water supplier

The Board cites the email August 30th 2007² indicating that Odonnell had sold 350 and 600 water bottles the preceding two years. The Opposer believes this was an erred finding because these 350 and 600 water bottles sold, were water bottles that did not have the Applicant's mark "Adventures of Shadow." The Opposer points out the e-mail submitted in the Odonnell deposition dated August 29th 2007³ from the Applicant to a person named David. In paragraph two of this email starting at line 15 the Applicant states that until the last Sunday evening which would have been August 26th 2007, he never thought about starting his trademark on water bottles but it was his guess that the Lord had David show up to help David understand creation better and him the Applicant get trademark going on water bottles. This clearly indicates that the Applicant never used the mark on water bottles prior to this email on August 29th 2007 so the water bottles sold in the amounts of 350 and 600 the preceding two years mentioned in the August 30th email did not use the Applicant's mark. The Applicant just came up with the idea of using the mark on water bottles just three days before these emails started.

¹ 67 TTABVUE 15.

² 57 TTABVUE 67-70.

³ 57 TTABVUE 68.

The emails themselves are from the Applicant talking about cost of having water bottles produced and inquiring about having artwork for a label created. There is no evidence in these emails, no receipts, no order confirmations, or witness testimony that the gentlemen David and Tom responded back to these emails, and that labels and water bottles were ordered, created, and sold. If the Applicant has these emails in his possession to David and Tom from this water bottle supplier, the Applicant should also have reply back emails from the water bottle supplier that show order confirmation, receipts of cost from materials and labor, and witness testimony from these two individuals. This clearly is ⁶not the case in this proceeding.

2. Picture of a water bottle bearing the Applicant's Mark

The Opposer argues that this grainy picture of the water bottle⁴ bearing the Applicant's mark does not prove or support the Respondent/Applicant's use of the mark on a water bottle on the filing date of the application or prior. There is no indication or proof that this photo was taken prior to the filing date of the application and the Applicant could have mocked the label up after this cancellation proceeding was filed. The actual specimen submitted by the Applicant in his application was not an image of a real physical water bottle, nor a real physical image of a label. It was digital jpeg file of the label graphic exported by some form of graphics software⁵ (See Attachment Ex. A). The Board agrees with the Opposer that the t-shirt specimen submitted by the Applicant appears to be a simulated mockup of a proposed t-shirt and not an actual t-shirt. The Opposer believes this to be also true for the specimen submitted to the USPTO by the Applicant on April 30 2008 with his application; it is also clearly looks to be a digital simulated mockup. The Opposer also argues that the label proof application is also simulated mockup and was the used as falsified evidence. The proof application is not signed nor is there any evidence that the Applicant submitted the proof via mail or email. During the Applicant's deposition he testified under oath the following:

"But this is the one I signed the contract below and I signed the final proof" ⁶

⁴ 58 TTABVUE 72.

⁵ 58 TTABVUE 30.

⁶ 56 TTABVUE 67.

During his testimony the Applicant indicates he signed a contract and he signed a final proof. Yet the Proof he submitted as evidence is not signed⁷, nor is it the same as the label on the grainy picture⁸, and the Applicant has failed to produce any evidence in relation to ordering water bottle labels that has his signature. So based on the Applicant's testimony and his evidence, they contradict each other. So either his evidence is false, his testimony is false, or both are false. The Opposer believes that the Applicant has shown a pattern of creating simulated mock ups and could have easily created a mockup water bottle with a label bearing his mark printed from home and taken a picture of it to submit as falsified evidence. The Opposer believes this to be the case; not only by the pattern of the Applicant creating simulated mock ups, but the complete lack of evidence via receipts, order confirmations, signed documentation, emails, or witness testimony that is not from the Applicant himself.

B. Argument Against The Board's Finding Of The Opposer's Evidence Failing To Show That The Respondent Discontinued Use Of the Mark On Water Bottles With No Intent To Resume Use

1. Applicant's Deposition Testimony

On page 17 of its decision, the Board cites on testimony as sufficient evidence⁹ where the Applicant testifies under oath that between 2008 and October 15, 2012 he sold water bottles at regional events and always had bottled water in stock and available for sale. We believe the Applicant lied under oath about this and is subject to perjury for the following reasons. The Applicant states under oath that between 2008 and October 15 2012 he always had water bottles in stock and available for sale. Yet the investigation by Fraud Investigator Robert Holmes Jr and an independent investigation by Opposer J-Lynn Entertainment LLC between September of 2012 and October 15 2012 found there to be no evidence that water bottles were for sale or had previously made for sale by the Applicant. When the Applicant spoke to Robert

⁷ 58 TTABVUE 71.

⁸ 58 TTABVUE 72.

⁹ 67 TTABVUE 17.

Holmes Jr on the phone it was between October 3rd 2012 when the Holmes investigation began to October 15th 2012 when he concluded and sent the investigation report to the Opposer. During the conversation with Mr. Holmes the Applicant responded¹⁰:

“We don’t have DVD’s at the moment. The only with Shadow in it right now is ‘Last One Out Turns Out the Light’ which has him in the end near a lighthouse looking at the camera.” Odonnell stated that the only merchandise he has on hand are 8”x10” and mouse pads.

If the testimony under oath by the Applicant was true that he always had water bottles in stock and for sale between 2008 and October 15 2012. Then the Applicant wouldn't have said to Mr. Holmes that the only merchandise he had on hand was an 8"x 10" and mouse pads. He would have offered to sell Mr. Holmes a water bottle and during that time Mr. Holmes and the Opposer would have found mention of water bottles for sale on the Applicants numerous websites. Mr. Holmes testified under oath that he could not find water bottles for sale, and he wasn’t offered water bottles to be sold to him by the Applicant¹¹. If the Applicant really had sold hundreds of bottles from October 15th 2012 and prior, always had them in stock, and went through the lengths of getting his mark registered in the class of water bottles. It is extremely hard to believe the Applicant wouldn’t have told Mr. Holmes about his water bottles and offered to sell him some, and Mr. Holmes could not find evidence of previous sales of water bottles.

The Opposer would also like to point out that the only witness testimony is from the Applicant himself during his deposition, which is completely self serving. As is typically the case when abandonment is involved, respondent claims that it has no intent to abandon. This proclamation is "warded little, if any, weight." *Rivard v. Linville*, 45 USPQ2d at 1376. As stated by the Federal Circuit, in every contested abandonment case, the respondent denies an intention to abandon its mark; otherwise there would be no contest. *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 14 USPQ2d at 1394. *See also Cervceria Modelo S.A. de C.V. v. R.B. Marco & Sons Inc.*, 55 USPQ2d 1298, 1303 (TTAB 2000)(respondent’s “self-serving testimony that it never intended to abandon its mark is unsupported by the evidentiary record, and is clearly insufficient to rebut the presumption of abandonment”); and

¹⁰ 41 TTABVUE 6.

¹¹ 47 TTABVUE 9-10.

Parfums Nautee Ltd. v. American International Industries, 22 USPQ2d 1306, 1309 (TTAB 1992) (respondent's statement of no intent to abandon "is little more than a denial in a pleading"; more is required than a conclusory declaration). Thus, rather than make a vague, unsubstantiated claim, respondent must submit evidence "with respect to what activities it engaged in during the nonuse period or what outside events occurred from which an intent to resume use during the nonuse period may reasonably be inferred." *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 14 USPQ2d at 1394. See *Republic Tobacco, L.P. v. Mark R. Newman, Cancellation No. 92049348*. The Opposer presents these past opinions of the Board in past abandonment cases.

The Applicant claims in his testimony to have attended a local California event called Big Foot Days, a local flea market¹², and sold products at store in the Bayshore Mall where he sold water bottles. Yet the Applicant has no other witnesses to testify on his behalf he attended these events and sold products using his mark. The exception is the Applicant's own self serving testimony. Other than that he has provided no evidence that he actually leased space at the Bayshore Mall or even attended or leased space for the Big Foot Days event or flea markets. Even if the Applicant is telling the truth, and did sell water bottles at these locations it would be mere intrastate commerce that does not constitute use in commerce regulated by Congress (that is, the type of use essential to not only obtaining a federal registration of a mark, but also to maintaining it under Sections 8 and 9 of the Trademark Act). See *Republic Tobacco, L.P. v. Mark R. Newman, Cancellation No. 92049348*. See *In re Mother Tucker's Food Experience (Canada) Inc.*, 925 F.2d 1402, 17 USPQ2d 1795 (Fed. Cir. 1991); and *In re Silenus Wines, Inc.*, 557 F.2d 806, 194 USPQ 261 (CCPA 1977). See also *Larry Harmon Pictures Corp. v. The Williams Restaurant Corp.*, 929 F.2d 662, 18 USPQ2d 1292 (Fed. Cir. 1991).

¹² 49 TTABVue 16, 25,

2. Applicant's Failure To Supply A Physical Water Bottle During Two Discovery Request With Extensions

Through out this proceeding the Applicant has failed to produce physical water bottles bearing his mark after the first discovery request and a second discovery request, which the Opposer had to file a motion to compel and gave the Applicant and his counsel two extensions to supply the physical water bottle specimens. The Opposer believes the Board has overlooked this fact that during the Applicant's testimony he claims to have continuously had water bottles in stock from 2008 to October 15th 2012¹³, and that at the time of the deposition both the Applicant testifies that he and his counsel had water bottles bearing the Applicant's mark¹⁴. Yet both the Applicant and his counsel failed to supply the Opposer with physical specimens to examine, and failed to offer Mr. Holmes water bottles for sale. Which calls us to believe that either water bottles were never manufactured or have been out of stock for many years, and the Applicant lied under oath about having water bottles in his possession and selling them continuously since his application date of the mark.

3. The Applicant Has Shown No Dated Evidence That Shows Three Consecutive Years Of Use

The Board states there are two elements to an abandonment claim: (1) discontinuance of use; and (2) an intent not to resume use. A plaintiff must show both of these elements unless it can show three years of nonuse, which prima facie establishes abandonment, in which case the burden shifts to the defendant to show either that it has used the mark, or that it has an intent to resume use. See *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 13 USPQ2d at 1309. The Opposers states cases in section 1 of this argument that other Board decisions (As is typically the case when abandonment is involved, respondent claims that it has no intent to abandon. This proclamation is "warded little, if any, weight." *Rivard v. Linville*, 45 USPQ2d at 1376. As stated by the Federal Circuit, in every contested abandonment case, the respondent denies an intention to abandon its mark; otherwise there would be no contest. *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 14 USPQ2d at 1394. *See also Cerveceria Modelo*

¹³ 67 TTABVUE 17.

¹⁴ 56 TTABVUE 68, 70.

S.A. de C.V. v. R.B. Marco & Sons Inc., 55 USPQ2d 1298, 1303 (TTAB 2000)(respondent’s “self-serving testimony that it never intended to abandon its mark is unsupported by the evidentiary record, and is clearly insufficient to rebut the presumption of abandonment”); and *Parfums Nautee Ltd. v. American International Industries*, 22 USPQ2d 1306, 1309 (TTAB 1992) (respondent’s statement of no intent to abandon “is little more than a denial in a pleading”; more is required than a conclusory declaration). Thus, rather than make a vague, unsubstantiated claim, respondent must submit evidence “with respect to what activities it engaged in during the nonuse period or what outside events occurred from which an intent to resume use during the nonuse period may reasonably be inferred.” *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 14 USPQ2d at 1394. *See Republic Tobacco, L.P. v. Mark R. Newman, Cancellation No. 92049348.*)

With these previous board decisions in mind, the last dated evidence that the Applicant has show was his 2009 inventory list that mentions the quantity of 221 Adventures of Shadow Bottled Waters¹⁵. Although there’s no way to tell if this inventory list is authentic, and that the items listed Adventures of Shadow bottled water are actually items that bear the Applicant’s mark. The Opposer in the case of this argument section 3 will entertain the idea that it could be truly authentic. With that in mind, the invoice is dated February 24th 2009. This is the last dated piece of evidence the Applicant has presented in relation to water bottles. When you consider that there is no other dated evidence leading up to when these proceedings were first filed November 27th 2012, or up to present day it is a clear indicator that the Applicant has failed to show evidence or documentation showing three years consecutive use for class 32 water bottles, which prima facie establishes abandonment. February 24th 2009 to November 27th 2012 over three years of absolutely no documentation.

3. The Board's Non-Acknowledgement Of Intrastate And Interstate Commerce Classifications In Regards To The Mark And The Lack Of Evidence Showing Either Activity

Purely intrastate use does not provide a basis for federal registration. However, if intrastate use directly affects a type of commerce that Congress may regulate, this constitutes use in commerce within the meaning of the Act. *See Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, 929 F.2d 662, 18

¹⁵ 58 TTABVUE 81.

USPQ2d 1292 (Fed. Cir. 1991). The Applicant has not shown evidence of sale transactions for water bottles at all in his home state of California or outside of the state. The Applicant has not provided evidence of online sales of water bottles. The only evidence is the Applicant's own self serving testimony that he sells products at a local flea market and at Big Foot Days, a festival held in Willow Creek, CA. The Board has overlooked that there is no actual evidence he actually attended the festivals, leased space to sell products, or was permitted to sell products. The Applicant has no evidence that he sold products to California residents or out of state residents at these events. The Big Foot Days festival is held deep within center of northern California. It is nowhere near the border of neighboring states, and the Opposer makes the strong argument that this classifies as intrastate commerce and does not constitute use in commerce regulated by Congress (that is, the type of use essential to not only obtaining a federal registration of a mark, but also to maintaining it under Sections 8 and 9 of the Trademark Act). *See Republic Tobacco, L.P. v. Mark R. Newman, Cancellation No. 92049348. See In re Mother Tucker's Food Experience(Canada) Inc.*, 925 F.2d 1402, 17 USPQ2d 1795 (Fed. Cir. 1991); and *In re Silenus Wines, Inc.*, 557 F.2d 806, 194 USPQ 261 (CCPA 1977). *See also Larry Harmon Pictures Corp. v. The Williams Restaurant Corp.*, 929 F.2d 662, 18 USPQ2d 1292 (Fed. Cir. 1991).

C. Behavior Of The Applicant In This Proceeding

The Opposer gives the following reasons to the Board to take the Applicant's evidence with the upmost scrutiny.

1. Applicant's Failure to supply materials

The only evidence the Applicant has presented is his own self serving testimony, an image of a water bottle and 2009 inventory list. Two things which the Applicant could have easily created after this proceeding was filed. With the addition of emails the Applicant sent inquiring about having water bottles made and logo designed, which there are no response emails from the recipients or indication that an actual order was confirmed and paid for. There is no other witness testimony or affidavits testifying on

behalf of the Applicant. There has been a complete lack of cooperation and transparency from the Applicant and his counsel on evidence during this proceeding, and a refusal/inability to provide just one physical water bottle bearing the Applicant's mark. The Opposer filed a motion to compel¹⁶ and the Applicant still failed to supply a physical water bottle to the Opposer. This shouldn't be the case if the Applicant had indeed been selling and manufacturing water bottles for at least three years prior to this proceeding being filed and had them in stock up to the day of his testimony. Which he testified both him and his counsel had some on hand.

2. Applicant's Use of Digital Mockups, Staged Evidence, And Modified Imagery

The Applicant has appeared to of made use of digitally mocked up specimens for his Applications. The Board has acknowledged in this proceeding that the Applicant's t-shirt specimen looks to be a "simulated mock up". We argue that inventory list is something that could have been easily created by the Applicant in a word processor after this proceeding was filed, and that the image bottle could have been a water bottle with a label the Applicant printed himself and stuck on the bottle. We believe this because the Applicant has failed to supply the Opposer a specimen for examination although he has stated he and his counsel Matthew Swyers had several during his testimony.

The Opposer would also like to point out to the Board that when you look back at some of the evidence that the Applicant submitted with his deposition. They are dated 2013 after this proceeding was filed. After the Opposer filed these cancellation proceedings the Applicant has proceeded to create Facebook pages, Twitter pages, and modification of websites to make it appear the Applicant is using his mark. In regards to the picture of the water bottle, the Applicant did not disclose this image during pre-trial disclosures or discovery. This image came from the Opposer that we disclosed to the Applicant's counsel during discovery which we pulled from the Applicant's personal Facebook page before he deleted during our internal investigation of his mark and notified him that his mark was subject for cancellation for non-use, abandonment, and fraud. We believe he deleted it because the label said "Limited Edition

¹⁶ 11 TTABVUE 4.

2008” hinting to a one time use and then abandonment. The Applicant then took the image and degraded the quality to the point where you can’t read the limited edition 2008 title and then compare it to the blank proof for the water supplier. We believe the Applicant purposely made the image hard to read. When you compare the image Applicant’s Exhibit 10¹⁷ to the original image from the Opposer’s Notice of Reliance Exhibit 4 and 10¹⁸. The Objection to The Opposer’s Notice of Reliance Exhibit should not have been sustained because it is the same water bottle image from exhibit 10¹⁷ as the Applicant’s exhibit 4 and 10¹⁸. It’s clear to see the Applicant purposefully made the picture black and white, darkened the image, and drastically reduced the quality, and the Board could not tell that these exhibits were all the same.

D. Based On The Board’s Argument and Decision That The Applicant’s Mark is Void Ab Initio For Clothing The Same Applies For The Applicant’s Application For Class 32 Water Bottles

1. The Applicant applied for the mark under class 32 water bottles with a digital mock up just like he for the mark under class 25 clothing that the Board refused registration of

In the Boards decision, the Board states on pg. 11 the following¹⁹:

“Such a mock-up of the goods without any corresponding sales of the goods does not support use in commerce as contemplated by Section 45. Based on the foregoing, we find that Respondent had not used his mark as of the filing date of his use-based application. Accordingly, Respondent was not entitled to registration under Trademark Act Section 1(a) and the application is void *ab initio*. See ShutEmDown Sports, 102 USPQ2d at 1045.”

If the Board found the Applicant’s mark to be void *ab initio* under the class 25 clothing for the fore mentioned reasons, then the Board erred in not find the Applicant’s mark void *ab initio* for class 32 water bottles. The reason for this is because the Applicant submitted a digitally mocked up label with the application without any corresponding sales of the goods, which does not support use in commerce as contemplated by Section 45. After examining the public Trademark Stats & Document Retrieval (TSDR) online and looking at every document submitted. The Opposer found the Applicant only submitted a one specimen dated on April 30 2008, which is a digital mock up jpeg of the water bottle label, the mock up

¹⁷ 57 TTABVUE 31, 71.

¹⁸ 39 TTABVUE 6.

¹⁹ 67 TTABVUE 11.

doesn't even show the label on a water bottle (See Attachment Ex. A). There are no corresponding sales with application. In the evidence presented to the Board the Applicant submitted the same digital mockup used with his Application in his testimony on deposition page 30²⁰, but no evidence of corresponding sales of goods prior to the use-based application date of April 30 2008 was presented to the Board in this proceeding, for the this reason the Board has erred in its decision to deny the cancellation of Registration No. 3682041 for class 32.

CONCLUSION

For the preservation of the integrity in the USPTO's administrative process, and avoidance of future applicants undermining the rule of law at the USPTO by submitting false statements, specimens, and modifying evidence to hide non-use. The Opposer urges the Board to reconsider what it believes to be an erred decision regarding the denial of the petition to cancellation the Applicant's mark "Adventures of Shadow" Registration No. 3682041 under the classes of goods IC 32 bottled drinking water on the grounds for non-use, abandonment, and fraud. The Opposer believes it is abundantly clear that in the Applicant's evidence of emails the water bottles mentioned to be sold did not bear the Applicant's mark and that the Board misinterpreted the emails. The Applicant had those set of emails, but no other emails with replies back from the water bottle company, no order confirmations, no receipts, and no witness testimony from employees of the water bottle company. He should have easily acquired this documentation if he had been selling water bottles from 2007 to 2013. The Board points out in its decision that the Applicant could have contacted his suppliers for documentation²¹. Based on these facts the mark should be void *ab initio* on that fact. The Opposer believes it is abundantly clear that testimony is flawed and that his description of a signed proof and signed order he submitted does not match the unsigned blank proof of submitted as evidence, and that the label design missing the limited 2008 wording on that blank proof does not match the design of the grainy image of the water bottle submitted as evidence. The Opposer would also like to conclude the Applicant's inability to offer Robert Holmes a water bottle, and his inability to provide the Opposer at least one physical water bottle, which contradicts

²⁰ 58 TTABVUE 30, 57 TTABVUE 29.

his testimony that he had water bottles in stock and for sale between 2008 and October 2012, and had water bottles during his sworn testimony. Which as a result points to the Applicant giving false testimony. The Opposer would like to conclude that Applicant has no evidence that shows legitimate sales first use in commerce, continued use in commerce for consecutive years after February 24 2009, and interstate commerce. If the Applicant really did use the mark in commerce the little evidence that the Applicant has provided would only show intrastate commerce between August 26th 2007 from the first email the Applicant submitted as evidence to February 24th 2009 where the inventory list submitted by the Applicant as evidence was printed. So based on that fact the Applicant's mark does not constitute use in commerce regulated by Congress (that is, the type of use essential to not only obtaining a federal registration of a mark, but also to maintaining it under Sections 8 and 9 of the Trademark Act) because there was only intrastate commerce and Applicant mark is subject for purposeful abandonment because it had been abandoned for at least three consecutive years from the last dated evidence of February 24th 2009 to November 27th 2012 when these cancellation proceedings were first filed.

(Attachment Ex. A).

http://tsdr.uspto.gov/#caseNumber=77461457&caseType=SERIAL_NO&searchType=statusSearch
<http://tsdr.uspto.gov/documentviewer?caseId=sn77461457&docId=SPE20080503065751#docIndex=40&page=1>

